PP

v.

OOI TENG CHIAN

COURT OF APPEAL, PUTRAJAYA
RICHARD MALANJUM JCA
HASHIM YUSOFF JCA
AUGUSTINE PAUL JCA
[CRIMINAL APPEAL NO: P-05-45-2004]
16 AUGUST 2005

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 37A(2) - Whether s. 37A(2) means that person to whom caution was administered not bound to answer any question even though other written laws require - Whether s. 37A(2) nullifies effect of s. 112(ii) Criminal Procedure Code*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 37A(1) - Whether s. 37A(1) expressly authorises asking of questions to elicit statement from person - In what circumstances might method of questioning render statement made inadmissible*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 37(j) - Whether percentage referred to in s. 37(j) refers to receptacles or total weight of drugs found or total weight of samples taken*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Possession of drugs - Where accused has custody of receptacles containing dangerous drugs, whether it must be shown that he had knowledge of the contents in order to establish that he had possession of the dangerous drugs - Principles for establishing knowledge*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 37(d) - Statutory presumption - Where knowledge on the part of accused to establish possession of dangerous drugs is presumed, whether possible to further presume that accused was trafficking in the dangerous drugs*

CRIMINAL PROCEDURE: *Sentence - Principles of sentencing - Drug related offences*

A police party conducted a raid at certain premises and broke open the door of a room in which they found the accused just waking up from sleep. He looked frightened. There was nobody else in the room. Nothing incriminating was found on the body of the accused. However, a search of the room produced several plastic packets suspected to contain heroin. Some personal belongings of the accused were also recovered from the room. The room had been rented by him. The exhibits seized were sent to the chemist who confirmed that they contained dangerous drugs. The accused was charged with trafficking in 149.6g of heroin and 35.77g of monoacetylmorphines under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s. 39B(2) of the Act. The accused made a cautioned statement under s. 37A of the Act. The learned trial judge ruled the cautioned statement to be inadmissible on the grounds that: (i) there was no compliance with s. 37A(2) of the Act; (ii) the questions asked by the recording officer amounted to cross-examination of a probing nature; and (iii) there was a failure to explain the consequences of making the statement to the accused.

At the conclusion of the case for the prosecution the trial judge amended the charge to one of possession under s. 12(2) of the Act and punishable under s. 39A(2)(d) of the Act. The accused pleaded guilty to the amended charge. Upon his conviction a sentence of nine years' imprisonment was imposed with effect from the date of his arrest. He was also ordered to be given 10 strokes of the rattan. The prosecution appealed against the conviction and sentence.

The following issues arose for consideration before the Federal Court: (a) the admissibility of the cautioned statement; (b) the sufficiency of the evidence of the chemist; (c) the reduction of the charge by the learned trial judge; and (d) the adequacy of the sentence imposed.

Held (dismissing the appeal against conviction and allowing the appeal against sentence in part)
Per Augustine Paul JCA:

[1] What s. 37A(2) of the Act means is that a person to whom a caution has been administered is not bound to answer any question even though some other written law may require him to do so. The "written law' referred to in s. 37(2) of the Act is a reference to s. 112(ii) of the Criminal Procedure Code which imposes a legal duty on a person to answer all questions except those that have a tendency to incriminate him. Thus the purpose of s. 37A(2) of the Act is to nullify the effect of s. 112(ii) of the Criminal Procedure Code. (p 570 f-h)

[2] A proper explanation of the caution with emphasis on the right of a person not to answer any questions as contained therein will ensure that s. 37A(2) of the Act has been complied with. Such an explanation will ensure that the person is clear in his mind that there is no obligation on him to answer questions so as to affect the voluntariness of the statement. It is therefore unnecessary to read s. 37A(2) of the Act to a person giving a statement. (p 571 b-c)

[3] Section 37A(1) of the Act expressly authorises the asking of questions in eliciting a statement from a person. However, in certain circumstances the method of questioning may render the statement made inadmissible. If the questions are in the nature of a cross-examination they are not unlawful per se. The test in determining whether the questions asked are offensive is to ascertain whether they have affected the voluntary nature of the statement. The starting point for such an exercise is the manner of establishing the voluntariness of the statement. It is settled law that a finding on the voluntariness of a statement is part objective and part subjective. (pp 571 d-e & 572 d-e)

[4] The accused had an evidential burden to elicit facts which bear on his subjective vulnerability in order to render the confession involuntary. As a statement obtained pursuant to a cross-examination mode of questioning during its recording will become inadmissible only if its voluntariness has been affected, it followed that the accused must testify on the manner in which the questions operated in his mind so as to cause him to make the statement. (pp 572 g-h & 573 a)

[5] The accused did not give any evidence on the effect the questions asked had on him in order to cause him to answer them. Without such evidence the learned trial judge proceeded to rule that the cross-examination of the accused by the recording officer amounted to probing questions being asked thereby rendering the statement involuntary. Clearly the learned trial judge was in error in making the ruling without any consideration of the subjective aspect of the questioning. (p 573 c)

[6] The consequences of the caution must be explained to the accused. The learned trial judge took this to mean that it must be explained to the accused that if he was found guilty he would be sentenced to death. There is no requirement in law for the caution to be explained as contemplated by the learned trial judge. What the accused must be made aware of was that he was not obliged to say anything or to answer any question and that anything he said might be used as evidence. (p 573 f-g)

[7] The cautioned statement made by the accused was inadmissible as there was no evidence of the actual words of the caution that was administered. (p 575 b)

[8] Under s. 37(j) of the Act a minimum of 10% of the contents of the receptacles must be analysed. The percentage referred to in s. 37(j) of the Act is a reference to the receptacles and not the total weight of the drugs found or the total weight of the samples taken. Where representative samples are taken from each receptacle it is for the chemist to determine the sufficiency of the required weight. That was the procedure followed in this case and was the correct course of action adopted. The samples analysed by the chemist were therefore sufficient in law to support her conclusion. (p 578 d-e)

[9] The learned trial judge referred only to the weight of the drugs to determine whether there was a prima facie case for trafficking. He ought to have analysed the whole of the evidence in order to make such a finding. (p 578 f-g)

[10] The accused had custody of the receptacles containing the dangerous drugs. What required deliberation was whether he had knowledge of the contents in order to establish that he had possession of the dangerous drugs. Proof of knowledge is very often a matter of inference. The court is not concerned with the knowledge of a reasonable man but is concerned with a reasonable inference to be drawn from a concrete situation as disclosed in the evidence as it affects the particular person whose knowledge is in issue. In this case, apart from proof of custody of the dangerous drugs there was no evidence on record to infer knowledge of them by the accused. The fact that the accused looked frightened was neutral on the facts of this case. It therefore became necessary to invoke the statutory presumption in s. 37(d) of the Act to infer the required knowledge on the part of the accused in order to establish that he had possession of the dangerous drugs. It was therefore not possible to further presume that the accused was trafficking in the dangerous drugs as provided in the Act. Hence, the reduction of the charge by the learned judge was still sustainable. (pp 578 h & 579 a, e-g)

[11] Sentencing in drug offences must reflect the public interest to be served as it is an on-going national problem. The weight of the drugs involved is another factor to be considered. In this case the amount of dangerous drugs involved was very substantial. In such circumstances neither the guilty plea of the accused nor the fact that he was a first offender could

be considered too favourably. The sentence imposed by the learned trial judge was inadequate. Accordingly, the term of imprisonment was increased to 15 years. The imposition of the 10 strokes of the rattan was retained. (pp 579 h & 580 a)

Obiter:

[1] If the drugs analysed are insufficient to sustain a charge for trafficking it cannot, by the same process of reasoning, be sufficient to sustain a charge for possession as well. This is for the obvious reason that s. 37(j) of the Act is of general application and not confined to only charges of trafficking. (p 578 f)

*[**Bahasa Malaysia** Translation Of Headnotes*

Satu pasukan polis telah membuat serbuan di satu bangunan dan telah memecah masuk pintu salah satu bilik di situ di mana mereka telah menjumpai tertuduh yang telah baru bangun tidur. Dia kelihatan dalam ketakutan. Tiada siapa lagi dalam bilik itu. Tiada apa-apa dijumpai di atas badan tertuduh yang menunjukkan yang dia bersalah. Walau bagaimanapun, satu carian dalam bilik itu telah menghasilkan beberapa paket plastik yang disyaki mengandungi heroin. Beberapa barang peribadi kepunyaan tertuduh juga telah dijumpai di bilik itu. Bilik tersebut telah disewa oleh tertuduh. Ekshibit yang telah dirampas itu telah dihantar kepada ahli kimia untuk dianalisa dan ahli kimia telah mengesahkan bahawa mereka mengandungi dadah berbahaya. Tertuduh telah dituduh dengan kesalahan mengedarkan 149.6g heroin dan 35.77g monoacetylmorphines di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ("Akta tersebut") dan boleh dihukum di bawah s. 39B(2) Akta tersebut. Tertuduh telah membuat satu pernyataan beramaran di bawah s. 37A Akta tersebut. Hakim perbicaraan yang bijaksana telah memerintahkan bahawa pernyataan beramaran tersebut tidak boleh diterima atas alasan bahawa (i) terdapat ketidakpatuhan dengan s. 37A(2) Akta tersebut, (ii) soalan yang telah ditanya oleh pegawai perekod merupakan satu pemeriksaan balas dalam bentuk penyiasatan dan (iii) kegagalan menjelaskan akibat pembuatan pernyataan tersebut kepada tertuduh.

Pada akhir kes pendakwaan, hakim Mahkamah Tinggi yang bijaksana telah meminda pertuduhan kepada pemilikan di bawah s. 12(2) Akta tersebut dan boleh dihukum di bawah s. 39A(2)(d) Akta tersebut. Tertuduh telah mengaku salah kepada pertuduhan pindaan ini. Selepas disabitkan, hukuman sembilan tahun penjara telah telah dijatuhkan bermula dari tarikh tangkapan. Terduduh juga telah diperintahkan diberikan 10 sebatan rotan. Pihak pendakwa telah merayu terhadap sabitan dan hukuman.

Isu-isu berikut telah dibangkitkan untuk pertimbangan Mahkamah Persekutuan: (a) Kebolehterimaan pernyataan beramaran tersebut; (b) Kecukupan keterangan ahli kimia; (c) Pengurangan pertuduhan oleh hakim yang bijaksana; dan (d) Kecukupan hukuman yang telah dijatuhkan.

Diputuskan (menolak rayuan terhadap sabitan dan membenarkan rayuan terhadap hukuman dalam sebahagian)
Oleh Augustine Paul HMR:

[1] Apa yang dimaksudkan oleh s. 37A(2) ialah seseorang kepada siapa amaran telah diberikan tidak perlu menjawab sebarang soalan walaupun undang-undang bertulis yang lain memerlukannya berbuat demikian. "Undang-undang bertulis" yang dirujuk di dalam s. 37(2) Akta tersebut adalah satu rujukan kepada s. 112(ii) Kanun Acara Jenayah yang mengenakan satu kewajipan undang-undang pada seseorang untuk menjawab semua soalan kecuali soalan-soalan yang berkemungkinan menunjukkan yang dia bersalah. Oleh itu, tujuan s. 37A(2) Akta tersebut ialah untuk membatalkan efek s. 112(ii) Kanun Acara Jenayah.

[2] Satu penjelasan yang betul bagi amaran tersebut dengan penekanan pada hak seseorang untuk tidak menjawab apa-apa soalan akan memastikan yang s. 37A(2) Akta tersebut telah ditepati. Penjelasan yang sebegitu akan memastikan yang orang tersebut jelas dalam fikirannya bahawa tidak ada kewajipan padanya untuk menjawab soalan-soalan yang boleh menjejaskan kerelaan pernyataan tersebut. Oleh itu adalah tidak perlu untuk membaca s. 37A(2) Akta tersebut kepada seseorang yang memberi pernyataan.

[3] Seksyen 37A(1) Akta tersebut dengan nyata mengizinkan penanyaan soalan-soalan dalam mendapatkan satu pernyataan daripada orang tersebut. Walau bagaimanapun, dalam keadaan tertentu, cara penyoalan boleh menjadikan pernyataan tersebut tidak boleh diterima. Sekiranya soalan-soalan tersebut adalah dalam bentuk pemeriksaan balas mereka tidaklah secara *per se* menyalahi undang-undang. Ujian untuk menentukan samada soalan-soalan yang ditanya itu adalah salah ialah dengan menguji sekiranya mereka telah menjejaskan kerelaan pernyataan tersebut. Titik permulaan untuk latihan ini ialah cara menentukan kerelaan pernyataan tersebut. Adalah undang-undang muktamad bahawa satu penemuan atas kerelaan sesuatu pernyataan adalah sebahagian objektif dan sebahagian subjektif.

[4] Tertuduh mempunyai beban membukti keterangan untuk mendapatkan fakta-fakta yang menunjukkan kelemahan subjektifnya demi menjadikan pengakuan salahnya tidak direla. Oleh kerana satu pernyataan yang didapati lanjutan penyoalan yang bercirikan pemeriksaan balas semasa ianya direkodkan akan menjadi tidak boleh diterima hanya sekiranya kerelaannya telah terjejas, adalah perlu untuk tertuduh memberi keterangan mengenai cara bagaimana soalan-soalan tersebut telah mempengaruhi fikirannya yang menyebabkannya membuat pernyataan tersebut.

[5] Tertuduh tidak memberikan apa-apa keterangan mengenai efek soalan-soalan tersebut padanya yang telah menyebabkannya menjawab mereka. Tanpa keterangan yang sebegitu, hakim perbicaraan yang bijaksana telah meneruskan dengan memerintahkan bahawa pemeriksaan balas tertuduh oleh pegawai perekod telah bersamaan dengan soalan-soalan bercirikan penyiasatan ditanya dan oleh itu menjadikan pernyataan tersebut tidak direlakan. Dengan jelas, hakim perbicaraan yang bijaksana telah salah dalam membuat perintah tersebut tanpa mengambilkira aspek subjektif penyoalan tersebut.

[6] Akibat akhir amaran tersebut mesti dijelaskan kepada tertuduh. Hakim perbicaraan yang bijaksana telah mengambil ini sebagai bermakna bahawa ianya perlu dijelaskan kepada tertuduh bahawa sekiranya ia disabitkan ia akan dijatuhkan hukum mati. Undang-undang tidak memerlukan amaran tersebut dijelaskan sepertimana yang dijangka oleh Hakim perbicaraan yang bijaksana. Apa yang perlu dijelaskan kepada tertuduh ialah bahawa ia tidak diwajibkan untuk mengatakan apa-apa atau untuk menjawab apa-apa soalan dan bahawa apa-apa yang dinyatakan olehnya boleh digunakan sebagai keterangan.

[7] Pernyataan beramaran tersebut yang telah dibuat oleh tertuduh tidak boleh diterima kerana tiada keterangan mengenai perkataan-perkataan sebenar berkenaan amaran tersebut yang telah diberikan.

[8] Di bawah s. 37(j) Akta tersebut, secara minima 10% daripada kandungan bekas yang berkenaan mesti dianalisakan. Peratusan yang dirujuk di dalam s. 37(j) Akta tersebut ialah rujukan kepada bekas dan bukan kepada jumlah berat dadah yang dijumpai atau jumlah berat contoh yang diambil. Di mana contoh wakilan di ambil daripada setiap bekas, terpulang kepada ahli kimia untuk memastikan kecukupan berat yang diperlukan. Itulah prosedur yang telah diikuti di dalam kes ini dan merupakan kaedah yang betul. Contoh-contoh yang telah dianalisa oleh ahli kimia adalah dengan itu cukup di sisi undang-undang untuk menyokong kesimpulannya.

[9] Hakim perbicaraan yang bijaksana telah hanya merujuk kepada berat dadah untuk memastikan sekiranya terdapat kes *prima facie* untuk pengedaran. Beliau sepatutnya menganalisa keseluruhan keterangan sebelum dapat membuat penemuan sedemikian.

[10] Tertuduh telah mempunyai jagaan bekas-bekas yang mengandungi dadah berbahaya tersebut. Apa yang perlu diselidik ialah samada dia mempunyai pengetahuan mengenai kandungannya untuk menetapkan yang dia mempunyai milikan dadah berbahaya tersebut. Bukti pengetahuan seringnya adalah satu perkara inferens. Mahkamah tidak peduli mengenai pengetahuan orang waras tetapi ingin tahu mengenai inferens yang munasabah yang boleh didapati daripada satu situasi kukuh seperti yang ditunjukkan di dalam keterangan kerana ianya memberi kesan kepada pengetahuan individu tersebut. Dalam kes ini, selain daripada bukti jagaan dadah berbahaya tiada keterangan dalam rekod untuk membuat inferens mengenai pengetahuan tentang dadah tersebut oleh tertuduh. Fakta bahawa tertuduh kelihatan takut adalah neutral dalam fakta kes ini. Oleh itu, adalah perlu untuk menggunapakai anggapan statutori dalam s. 37(d) Akta tersebut untuk membuat inferens mengenai pengetahuan yang diperlukan pada sebelah tertuduh untuk menetapkan bahawa dia mempunyai milikan dadah berbahaya tersebut. Oleh itu tidak mungkin untuk seterusnya membuat anggapan bahawa tertuduh mengedarkan dadah berbahaya sepertimana yang diperuntukkan di dalam Akta tersebut. Oleh yang demikian, pengurangan pertuduhan tersebut oleh hakim Mahkamah Tinggi yang bijaksana adalah tidak salah.

[11] Penghukuman dalam kesalahan melibatkan dadah mesti mencerminkan kepentingan awam yang perlu dimajukan kerana ianya adalah satu masalah kebangsaan yang berlanjutan. Berat dadah yang terlibat adalah satu lagi faktor yang perlu dipertimbangkan. Dalam kes ini, amaun dadah berbahaya yang terlibat adalah agak banyak. Dalam keadaan ini, pengakuan salah oleh tertuduh dan fakta bahawa ia adalah kesalahan pertamanya tidak boleh diambil kira secara sepenuhnya berpihak kepada tertuduh. Oleh itu, hukuman yang dijatuhkan oleh hakim perbicaraan yang bijaksana adalah tidak mencukupi. Justeru, tempoh pemenjaraan telah ditingkatkan kepada 15 tahun. Pemberian 10 sebatan rotan dikekalkan.

Obiter:

[1] Sekiranya dadah yang dianalisakan tidak mencukupi untuk menyokong satu pertuduhan untuk pengedaran, ianya tidak boleh, menggunakan proses taakulan yang sama, mencukupi untuk menyokong satu pertuduhan milikan. Ini adalah atas sebab yang amat jelas bahawa s. 37(j) Akta tersebut adalah terpakai secara am dan tidak terkurung kepada pertuduhan mengedar sahaja.

Case(s) referred to:
Aziz Muhamad Din v. PP [1997] 1 CLJ Supp 523 HC ***(refd)***
Chai Chien Wei Kelvin v. PP [1999] 1 SLR 25 ***(refd)***
Chan Pean Leon v. PP [1956] MLJ 237 ***(refd)***
Dato' Mokhtar Hashim v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Datuk Hj Harun Hj Idris v. PP [1977] 2 MLJ 155 ***(refd)***
Francis Anthonysamy v. PP [2005] 2 CLJ 481 FC ***(refd)***
Gunalan Ramachandran & Ors v. PP [2004] 3 CLJ 551 CA ***(refd)***
Juraimi Husin v. PP [1998] 2 CLJ 383 CA ***(refd)***
Lau Song Seng & Others v. PP [1998] 1 SLR 663 ***(refd)***
Lee Weng Sang v. PP [1978] 1 MLJ 168 ***(refd)***
Loo Kia Meng v. PP [2000] 3 CLJ 653 CA ***(refd)***
Muhamed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Poon Heong v. PP [1949] MLJ 114 ***(refd)***
PP v. Hoo Chee Keong [1997] 2 CLJ Supp 357 HC ***(refd)***
PP v. Law Say Seck & Ors [1971] 1 MLJ 199 ***(refd)***
PP v. Mohd Fuzi Wan Teh & Anor [1989] 2 CLJ 652; [1989] 2 CLJ (Rep) 341 HC ***(refd)***
PP v. Tay Bee Seng [1993] 1 CLJ 526 HC ***(refd)***
R v. Brophy [1981] 2 All ER 705 ***(refd)***
R v. Fitton (156) 116 CCC 1 ***(refd)***
R v. Precourt [1976] 39 CCC (2d) 311 ***(refd)***
RCA Corp v. Customs Cleared Sales Pty Ltd [1978] 19 ALR 123 ***(refd)***
Seow Choon Meng v. PP [1994] 2 SLR 853 ***(refd)***
Sim Ah Cheoh v. PP [1991] 2 MLJ 353 ***(refd)***
Syed Yasser Shaik Mohamed v. PP [2000] 4 SLR 27 ***(refd)***
Wong Kam-Ming v. R [1979] 1 All ER 939 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 112(ii)
Dangerous Drugs Act 1952, ss. 12(2), 37A(1), (2), 37(d), (j), 39A(2)(d), 39B(1)(a)

For the appellant - Meor Hashimi Abdul Hamid DPP
For the respondent - Khoo Chye Beng (R Thinukaran with him); M/s Athimulan & Co

[Appeal from High Court, Pulau Pinang; Criminal Trial No: 45-36-1999]

Reported by Amutha Suppayah

JUDGMENT

Augustine Paul JCA:

In this case the accused was charged with the offence of trafficking in 149.60 grammes of heroin and 35.77 grammes of monoacetylmorphines under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") and punishable under s. 39B(2) of the Act in the High Court in Penang. At the conclusion of the case for the prosecution the learned High Court Judge amended the charge to one of possession under s. 12(2) of the Act and punishable under s. 39A(2)(d) of the Act. The accused pleaded guilty to the amended charge. Upon his conviction a sentence of nine years' imprisonment was imposed with effect from the date of his arrest. He was also ordered to be given 10 strokes of the rottan. This appeal is by the prosecution against the conviction and sentence.

Briefly stated the facts of the case are that on 5 March 1999 Abdul Rahim bin Shariff (PW9) led a police party to conduct a raid at premises Number 5, Lebuh Melaka, Georgetown, Pulau Pinang. As the grill door to the premises was locked and was not opened despite requests to do so it was forced open. There was nobody in the ground floor nor was anything incriminating found. PW9 then went upstairs with two others. There were two rooms in that floor. Nothing was found in the first room. When they broke open the door of the second room they found that it was not lighted. When they switched on the lights they found that the accused had just woken up from sleep. He looked frightened. There was nobody else in the room. Nothing incriminating was found on the body of the accused. PW9 then conducted a search of the room. He found the following:

(a) Three plastic packets suspected to contain heroin were in a Sanyo Cordless Phone box which was on a steel cabinet,

(b) Six plastic packets suspected to contain heroin were in a kotak tabung which was on the upper part of the clothes rack,

(c) Ten plastic packets suspected to contain heroin were in an envelope which was in a Chinese tea tin container in the same rack, and

(d) Three plastic packets suspected to contain heroin were on the dressing table

Some personal belongings of the accused were also recovered from the room. The room had been rented by him. The exhibits seized were sent to the chemist for analysis who confirmed that they contained dangerous drugs as stated in the charge. The accused also made a cautioned statement under s. 37A of the Act. This was ruled as inadmissible by the learned trial judge. Upon the charge being amended to one of possession the accused pleaded guilty and he was sentenced accordingly.

The submissions advanced by both the parties before us warranted consideration of the following issues:

(a) The admissibility of the cautioned statement

(b) The sufficiency of the evidence of the chemist

(c) The reduction of the charge by the learned trial judge

(d) The adequacy of the sentence imposed

The four issues will now be considered.

(a) The Admissibility Of The Cautioned Statement

In ruling that the cautioned was inadmissible the learned trial judge said in his grounds of judgment:

> I shall now decide whether ID37 was made voluntarily or not.
>
> Section 37(A)(2) of the Dangerous Drug Act 1952 ('the DDA') reads as follows:
>
> > (2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which subsection (1) applies shall not be bound to answer any questions relating to such case after any such caution as aforesaid has been administered to him.
>
> The recording officer (TSP1) has stated that after he read the caution under Section 37(A)(1)(b) of the DDA he did not inform the accused that he need not answer any questions as provided under Section 37(A)(2) of the DDA.
>
> In the case of *PP v. Tay Bee Seng* [1993] 1 AMR 426 His Lordship Abdul Malik bin Hj Ishak JC (as he then was) at page 436 said:
>
> > Inspector Syed Talib stated that he could not remember reading the provisions of s. 37A(2) of the Dangerous Drugs Act to the accused. Now subsection (2) of s. 37A of the Dangerous Drugs Act reads thus:

(2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which subsection (1) applies shall not be bound to answer any questions relating to such case after any such caution as aforesaid has been administered to him.

The court cannot speculate what would be the reaction of the accused had subsection (2) of s. 37A been read to him, as this was not done. However, there was evidence during the trial within the trial that the accused did not volunteer to give the cautioned statement. This piece of evidence came from ASP Ahmad bin Megat Hussain (BDB SP1) who had earlier directed one Inspector Syed Talib to record the cautioned statement of the accused. It would therefore not be unreasonable for the court to deduce favourably for the accused that he would not give the statement had the provisions of subsection (2) of s. 37A been read to him.

In our case it would be reasonable for the Court to deduce favourably for the accused that he would not give the statement had the provisions of Section 37A(2) of the DDA read to him.

In ID37 in lines 32 to 33 of page 2 the accused has stated 'Polis telah jumpa sepuluh lebih hingga dua puluh peket "pekhun" di dalam bilik saya.'

And in lines 35 to 43 the recording officer asked the accused the following questions:

S: Apakah yang kamu maksudkan dengan "Pekhun" yang kamu sebutkan di atas?

J: "Pekhun" adalah dadah.

S: Dadah yang kamu sebutkan di atas itu siapa yang punya?

J: Saya yang punya.

S: Untuk tujuan apakah kamu simpan dadah itu dalam bilik kamu?

J: Untuk hisap sendiri dan saya juga ada jual sedikit kepada orang lain.

S: Rumah di mana kamu ditangkap adalah kepunyaan siapa?

J: Rumah ini kepunyaan Lau Soh Kee dan saya sewa bilik daripadanya dengan bayaran RM200.00 sebulan.

And at page 3 lines 2 to 4 the recording officer asked the following question:

S: Adakah kamu berkongsi bilik dengan orang lain?

J: Tidak.

ID37 contains 6 questions asked by the recording officer. No doubt the recording officer can ask questions but his questions should not be leading, suggestive and probing questions.

The recording officer has admitted that the 6 questions that were asked by him disclose the nature of the drugs, the identity of the person, the drugs belongs to whom, the purpose of the drug been kept in the room and the ownership of the house and the value of the drugs and finally whether the room where the offending exhibits found whether(sic) shared by any others. Whereas the narrative answers given by the accused does not show all the elements mentioned above except the word of 'Pekhun'.

The recording officer has carried out cross-examination to enquire as to elements of the crime by probing questions. On this ground alone this shows that the statement is not made voluntarily. In the case of *PP v. Tay Bee Seng (supra)* His Lordship Abdul Malik bin Haji Ishak JC (as he then was) at p. 37 said:

> Again in the purported cautioned statement (ID14) there were 13 questions posed by Inspector Syed Talib to the accused. These 13 questions were in the nature of cross-examination .. *Stone's Justices' Manual*, 79th edition p. 292 stated in no uncertain terms the following:
>
> > A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

The recording officer in cross-examination has stated that he did not tell the accused that if the accused admit to the finding of the offending drugs and if the accused is found guilty he will be sentenced to death. So I am of the view that the recording officer has not explained the consequences of giving statement.

In the case of *PP v. Mohd Fuzi b Wan Teh & Anor* [1989] 2 CLJ 652 His Lordship Shaik Daud J (as he then was) at page 654 said:

> On the first issue that is that the caution was not explained to the accused I tend to agree. PW8 in his evidence said that he "read" the caution as in S 37A of the Dangerous Drugs Act 1952 and no-where did he say that he explained it as well. A man may be literate enough to be able to read but to understand and know what the consequences of what was being read to him is entirely another thing, more so when we are dealing with language of the law. It is my view that administering of the caution should

> not be merely a mechanical exercise of just reading it to the accused person. PW8 should have not merely read the caution but also explained it and its consequences to the accused. This he did not.
>
> The accused has agreed to the suggestion during cross-examination that at the time of recording of the statement he was not in a proper state of mind.
>
> In view of the aforesaid I find that ID37 was not made voluntarily. So I hold that ID37 is not admissible in evidence.

The learned trial judge had ruled the cautioned statement to be inadmissible on the ground that

(i) there was no compliance with s. 37A(2) of the Act,

(ii) the questions asked by the recording officer amounted to cross-examination of a probing nature, and

(iii) the failure to explain the consequences of making the statement to the accused.

We shall now consider the three grounds.

(i) There Was No Compliance With s. 37A(2) Of The Act

Section 37A(2) of the Act reads as follows:

> Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which subsection (1) applies shall not be bound to answer any questions relating to such case after any such caution as aforesaid has been administered to him.

The significance of this provision of law as explained in *PP v. Tay Bee Seng* [1993] 1 CLJ 526 is not a clear, complete and accurate reflection of its scope. What it means is that a person to whom a caution has been administered is not bound to answer any question even though some other written law may require him to do so. The "written law' referred to in s. 37(2) of the Act is a reference to s. 112(ii) of the Criminal Procedure Code which imposes a legal duty on a person to answer all questions except those that have a tendency to incriminate him. Thus the purpose of s. 37A(2) of the Act is to nullify the effect of s. 112(ii) of the Criminal Procedure Code. This view is supported by the unreported case of *PP v. Lee Weng* (Raub Criminal Trial No 3 of 1949) cited with approval by Willan CJ in *Poon Heong v. PP* [1949] MLJ 114 in commenting on para. 2 of Regulation 33 which is similarly worded as s. 37A(2) of the Act. As his Lordship said at p. 115:

> … if questions are to be allowed, the provisions of paragraph (2) of the Regulation have to be emphasised because otherwise an accused person familiar with the normal law under section 112 of the Criminal Procedure Code, but unfamiliar with the Regulations might think that he was legally bound to answer the questions and to answer them truly. Section 112 has existed for so long that such a state of mind could not, I think, be considered unreasonable.

It will be observed that s. 37A(2) of the Act reiterates what is contained in the caution. Thus a proper explanation of the caution with emphasis on the right of a person not to answer any questions as contained therein will ensure that s. 37A(2) of the Act has been complied with. Such an explanation will ensure that the person is clear in his mind that there is no obligation on him to answer questions so as to affect the voluntariness of the statement. It is therefore unnecessary to read s. 37A(2) of the Act to a person giving a statement. To that extent the learned trial judge has been misguided by the authority relied on by him.

(ii) The Questions Asked By The Recording Officer Amounted To Cross-examination Of A Probing Nature

Section 37A(1) of the Act expressly authorises the asking of questions in eliciting a statement from a person. As a matter of fact properly conducted police questioning is a legitimate and effective aid to criminal investigation (see *R v. Precourt* [1976] 39 CCC (2d) 311). However, in certain circumstances the method of questioning may render the statement made inadmissible. If the questions are in the nature of cross-examination they are not unlawful *per se* (see *Datuk Haji Harun bin Haji Idris v. PP* [1977] 2 MLJ 155; *Lee Weng Sang v. PP* [1978] 1 MLJ 168). In *Syed Yasser Arafat bin Shaik Mohamed v. PP* [2000] 4 SLR 27 it was held that the interrogation preceding a confession may be robust and the mere use of the question and answer method of cross-examination in recording a confession would not render the statement involuntary. However, in *Lau Song Seng & Others v. PP* [1998] 1 SLR 663 the Singapore Court of Appeal in following *Sim Ah Cheoh v. PP* [1991] 2 MLJ 353 and *Seow Choon Meng v. PP* [1994] 2 SLR 853 held that a cross-examination style of interrogation does not render the statement given involuntary unless the questioning was so vigorous or prolonged that it could be said to be oppressive. Thus as observed by the Federal Court in *Datuk Haji Harun bin Haji Idris v. PP* [1977] 2 MLJ 155 the admissibility of a statement is not affected by the nature of the questions asked if it is otherwise voluntary. In this regard reference may be made to *R v. Fitton* (156) 116 CCC 1 where Rand J said:

> The rule on the admission of confessions, which, following the English authorities, was restated in *Boudreaux v. The King*, 94 Can CC 1, [1949] 3 DLR 81, SCR 262, at times presents difficulty of application because its terms tend to conceal underlying considerations material to a determination. The cases of torture, actual or threatened, or of unabashed promises are clear; perplexity arises when much more subtle elements must be evaluated. The strength of mind and will of the accused, the influence of custody or its surroundings, the effect of questions or of conversation, all call for delicacy in appreciation of the part they have played behind the admission, and to enable a Court to decide whether what was said was freely and voluntarily said, that is, was free from the influence of hope or fear aroused by them.
>
> …
>
> Questions without intimidating or suggestive overtones are inescapable from police inquiry; and put as they were here, they cannot by themselves be taken to invalidate the response given. The question still remains: was the statement made through fear or hope induced by authority? (emphasis added)

The test, therefore, in determining whether the questions asked are offensive is to ascertain whether they have affected the voluntary nature of the statement. The starting point for such an exercise is the manner of establishing the voluntariness of a statement. It is settled law that a finding on the voluntariness of a statement is part objective and part subjective (see *Dato' Mokhtar bin Hashim v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101). As Yong Pung How CJ said in *Chai Chien Wei Kelvin v. PP* [1999] 1 SLR 25 at p 52:

> The objective limb is satisfied if there is a threat, inducement or promise, and the subjective limb when the threat, inducement or promise operates on the mind of the particular accused through hope of escape or fear of punishment connected with the charge: *Dato' Mokhtar bin Hashim v. Public Prosecutor* [1983] 2 MLJ 232 and *Mohd Desa bin Hashim v. Public Prosecutor* [1995] 3 MLJ 350.

Thus the accused has an evidential burden to elicit facts which bear on his subjective vulnerability in order to render the confession involuntary (see *Juraimi bin Husin v. PP* [1998] 2 CLJ 383; *PP v. Law Say Seck and Others* [1971] 1 MLJ 199). The corollary is that an accused person who is seeking to challenge the admissibility of a confession on the ground of involuntariness may for all practical purposes be obliged to testify in the trial within a trial if his challenge is to have any chance of succeeding (see *Aziz bin Muhamad Din v. PP* [1997] 1 CLJ Supp 523; *Wong Kam-ming v. R* [1979] 1 All ER 939; *R v. Brophy* [1981] 2 All ER 705). It is only his evidence which will establish the subjective aspect of the involuntariness of the statement. As a statement obtained pursuant to a cross-examination mode of questioning during its recording will become inadmissible only if its voluntariness has thereby been

affected it follows that the accused must testify on the manner in which the questions operated in his mind so as to cause him to make the statement. His evidence may, for example, reveal that the questions were of such a nature that they amounted to an intimidating and threatening form or oppression to compel him to answer them thereby making the statement inadmissible. In the absence of such evidence it will not be possible to make a ruling on the effect of the questions in order to satisfy the subjective element of voluntariness. Thus it is absolutely necessary for an accused to lead evidence on the effect of questions in the nature of cross-examination on him in order to determine the voluntariness of the resultant statement.

The accused did not give any evidence on the effect the questions asked had on him in order to cause him to answer them. Without such evidence the learned trial judge proceeded to rule that the cross-examination of the accused by the recording officer amounted to probing questions being asked thereby rendering the statement involuntary. This, as explained earlier, is only the first part of the test that is involved in an objection of this nature. Clearly the learned trial judge was in error in making the ruling without any consideration of the subjective aspect of the questioning. He had misdirected himself in following *PP v. Tay Bee Seng* [1993] 1 CLJ 526 which had not fully explored the law in this area.

(iii) The Failure To Explain The Consequences Of Making The Statement To The Accused

In *PP v. Mohd Fuzi bin Wan Teh & Anor* [1989] 2 CLJ 652; [1989] 2 CLJ 341 it was held that the consequences of the caution must be explained to the accused. The learned trial judge took this to mean, on the facts of this case, that it must be explained to the accused that if he is found guilty he would be sentenced to death. There is no requirement in law for the caution to be explained as contemplated by the learned trial judge. At the time of recording the statement the police authorities may not even have decided on the provision of law under which the accused is to be charged, if at all. Therefore it is not possible to explain the caution to the accused in the terms as propounded by the learned trial judge. What the accused must be made aware of is that he is not obliged to say anything or to answer any question and that anything he says may be used as evidence. The unnecessary extension of the requirements of the caution by the learned trial judge is an error of law.

It follows that the grounds upon which the learned trial judge ruled the cautioned statement as being inadmissible cannot be sustained in law. However, the ruling made can be justified on another ground. A perusal of the notes of evidence reveals that there is no evidence of the actual words of the caution read to the accused. The need for such evidence was stressed recently by the Federal Court in *Francis Antonysamy v. PP* [2005] 2 CLJ 481 at pp 492-493:

> The logical corollary is that evidence that the caution under section 113 was merely read will deprive the Court of the opportunity to exercise its discretion in order to determine whether the caution that was administered is as prescribed or to the like effect. It will amount to the Court accepting the conclusion of the witness that the prescribed caution had been administered when the conclusion is one that must be arrived at by the Court itself based on evidence that has been adduced. The Court can be 'satisfied' that the caution was administered as required only with adequate proof of the words used. This can only be done if there has been evidence of the actual words used by the recording officer. In that event the Court would be in a position to determine whether the caution that was administered is as prescribed or to the like effect or is something that is different. Oral evidence of the words used is particularly significant in this case as it is subject to appellate review. There is no such oral evidence though the words used appear in the cautioned statement. The resultant matter for consideration is whether the cautioned statement can be used as evidence of the words of the caution that was administered. The relevant part of the cautioned statement reads as follows:
>
> > Sebelum saya merakamkan percakapan tertuduh ini, terlebih dahulu saya memberi amaran kepada beliau mengikut sek 113 KAJ seperti berikut "Adalah menjadi kewajipan saya untuk memberi amaran kepada kamu bahawa kamu tidaklah diwajibkan menyatakan sesuatu atau menjawab apa-apa soalan tetapi apa apa jua yang kamu nyatakan sama ada sebagai menjawab sesuatu soalan atau tidak, boleh diberi sebagai keterangan."
>
> The contents of a cautioned statement are substantive evidence of whatever the accused had said. As the passage just reproduced is a statement of the recording officer it is not substantive evidence. It can only be used to corroborate his evidence under s. 157 of the Evidence Act 1950. Corroborative evidence is only admissible to support testimony that has already been given. It is not admissible to supplement such testimony. In *Yap Ee Kong & Anor v. PP* [1981] 1 MLJ 144 this court adopted Director or *Public Prosecution v. Hester* [1973] AC 296 where it was held that the purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible. It was further held that if the evidence to be corroborated is found to be uninspiring and unacceptable then corroboration would be futile and unnecessary. It follows that in the absence of any evidence by the recording officer of the actual words

of the caution that was administered evidence of such words in the cautioned statement cannot be used to supplement the deficient evidence. In any event he did not say that the caution that he read is as recorded in the cautioned statement.

The result is that there is no evidence before the Court in order to be 'satisfied' whether the caution that was administered is as prescribed or contain words to the like effect.

The cautioned statement made by the accused is therefore inadmissible as there is no evidence of the actual words of the caution that was administered.

(b) The Sufficiency Of The Evidence Of The Chemist

The material part of the evidence of the chemist pertinent to the issue now under consideration reads as follows:

S: Bolehkah puan memberikan jumlah sampel yang diambil untuk dianalisa bagi tiap-tiap barang kes tersebut secara terperinci?

J: Jumah sampel bagi peket plastik A1 hingga A7 ialah 4.3731 gram.

Berat sampel bagi peket plastik yang bertanda E2 – 7 ialah 2.7429 gram.

Jumlah berat sampel bagi peket-peket plastik yang bertanda E2 – 2 hingga E2 – 6 ialah 1.3594 gram.

Jumlah sampel bagi peket-peket plastik yang bertanda BB1 hingga BB10 ialah 8.7864 gram.

Berat sampel bagi peket-peket plastik bertanda E4 – 3, ialah 0.2633 gram.

Jumlah berat sampel bagi peket-peket plastik yang bertanda E4 – 1 dan E4 – 2 ialah 0.1882 gram. Kesemua berat sampel-sampel tadi adalah mencukupi untuk tujuan analisis.

S: Adakah berat sampel-sampel tersebut telah mencapai 10% daripada keseluruhan berat peratusan heroin dan monoacetylmorphines tadi?

J: Jumlah berat sampel-sampel tersebut tidak mencapai 10% daripada berat heroin atau monoacetylmorphines kerana dalam analisis secara scientific tidak ada othoriti yang mewajibkan pengambilan sampel sebanyak 10%. Saya tidak perlu mengambil sampel sebanyak 10% kerana sampel yang melebihi 10% berat memberikan keputusan yang sama dengan keputusan yang diberikan oleh sampel yang kurang 10% berat. Peratusan sampel tidak memberikan keputusan yang berbeza. Saya telah mengambil sampel yang mencukupi untuk tujuan analisis berdasarkan standard operation procedure yang dikeluarkan oleh Jabatan Kimia Malaysia. Standard Operation Procedure ini adalah berdasarkan United Nations Manual dan diikuti oleh semua cawangan Jabatan Kimia Malaysia. …

S: Semalam puan ada memberi keterangan bahawa puan ada mengambil sampel … bagi tujuan ujian dan analisa terhadap kesemua barang-barang kes ini. Soalan saya bagaimanakah cara puan mengambil sampel bagi setiap barang kes tersebut?

J: Didalam kes ini kesemua bahan tersebut saya kisar dengan menggunakan Kitchen Blender. Saya mengisar selama 10 minit. Didalam masa 10 minit itu saya menggoncang-goncangkan bahan yang dikisar didalam peket plastik kemudian saya masukkan semula ke dalam Kitchen Blender dan saya kisar sekali lagi. Tujuan saya ialah agar semua bahan tersebut homogenize. Selepas itu saya mengambil sedikit sampel untuk tujuan analisis.

S: Bagaimana pula dengan keadaan Kitchen Blender yang dimaksudkan samada ia berfungsi dengan baik atau tidak?

J: Kitchen Blender yang saya gunakan masih berfungsi dengan baik.

S: Bagaimana puan dapat pastikan bahawa kesemua sampel tersebut telah dihomogenisekan?

J: Kaedah sampling ini telah diuji oleh Unit Pembangunan dan Jaminan Kualiti di Jabatan Kimia Petaling Jaya.

Mengikut data yang mereka perolehi dari ujian tersebut mereka dapati peratusan coefficient of variation menjadi leveled of setelah 5 minit pengisaran. Ini adalah berdasarkan graf masa melawan peratus coefficient of variation. Setelah unit pembangunan dan jaminan kualiti mengesahkan perkara ini maka kaedah pengisaran untuk menghomogenisedkan bahan ketulan dan serbuk dilakukan di semua cawangan Jabatan Kimia.

Keputusan yang saya perolehi daripada data gas chromatography adalah reproducible di mana coefficient of variation yang saya perolehi adalah kurang 5%. Dalam instituision coefficient of variation yang digunakan adalah 5%. Berdasarkan sebab-sebab tadi saya pasti bahawa sampel yang saya ambil telah mencukupi kerana kesemua bahan tersebut telah homogenize dan mempunyai peratus heroin dan monoacetylmorphines yang sama tidak kira berapa berat sampel yang saya ambil.

S: Adakah sampel tersebut mencukupi kesemua barang-barang kes ini?

J: Kesemua sampel tersebut adalah mewakili kesemua barang kes tersebut.

In dealing with the evidence of the chemist the learned trial judge said in his grounds of judgment:

The next issue is whether the prosecution has made out a *prime facie* case.

Section 37(j) of the DDA reads as follows:

> (j) when any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum of such receptacles and if such analysis establishes that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the samples so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, that the contents of all the receptacles consist of or contain the same proportion of such drug.

In the case of *Loo Kia Meng v. PP* [2000] 3 MLJ 664 His Lordship Shaik Daud JCA (in delivering the judgment of the Court of Appeal) at p. 668 said:

> He testified that he took 20 random samples and after doing the chemical tests he concluded that all the dried plant material to be cannabis as defined in s. 2 of the Act. Now under s. 37(j) of the Act, the chemist is required to take a minimum of 10% from the receptacle in which the drug was found. The chemist merely said he took 20 random samples but nowhere has he said in his evidence that this 20 random samples represented at least 10% of the dried plant material. For all we know the 20 random samples may be more, or for that matter, may be less than 10%. It is incumbent upon the chemist to take a minimum of 10% by virtue of s. 37(j) of the Act. We find that when he said he took 20 random samples, it is ambiguous as the 20 samples could be more or less than 10%. The learned DPP submitted that the 20 samples taken by the chemist represented a fair sample of the total. With respect, we are unable to agree with that submission because the 20 samples could well be much less than the 10% required to be taken. We hold that pursuant to s. 37(j) of the Act, the chemist is required to give the actual amount or the actual weight of the samples taken in order to comply with that section.

Elliza bt Mat Nor (SP2) the Chemist has in her examination-in-chief stated that the weight of the samples did not reach 10% of the weight of the heroin or monoacetylmorphines because in the scientific analysis there is no authority that 10% of the sample must be taken.

In cross-examination SP2 agreed that in the analysis of the drugs she did not use the provision of Section 37(j) of the DDA.

In view of the aforesaid I find that so far as the charge of trafficking is concerned, the case against the accused was not proved beyond reasonable doubt. (See the case of *Loo Kia Meng v. PP* [2000] 3 MLJ 664.)

I accordingly amended the charge to one of possession of 185.3 gram of dangerous drugs (149.60 gram heroin and 35.77 gram monoacetylmorphines) under Section 12(2) read with Section 39A(2)(d) of the DDA and called upon the accused to enter his defence.

In *Loo Kia Meng v. PP* [2000] 3 CLJ 653 it was held that under s. 37(j) of the Act a minimum of 10% of the contents of the receptacles must be analysed. As this was not done the charge of trafficking was reduced to one of possession. The learned trial judge followed this course of action as the chemist in this case also did not analyse 10% of the total contents of the receptacles. The samples that she took from the contents of the receptacles after having homogenized them was less than 10%. In *Gunalan a/l Ramachandran & 2 Others v. PP* [2004] 3 CLJ 551 Abdul Hamid JCA (as he then was) in an illuminating judgment declined to follow *Loo Kia Meng v. PP* [2000] 3 CLJ 653 and held that the percentage referred to in s. 37(j) of the Act is a reference to the receptacles and not the total weight of the drugs found or the total weight of the samples taken. Where representative samples are taken from each receptacle it is for the chemist to determine the sufficiency of the required weight. That was the procedure followed in this case and is the correct course of action adopted as explained in *Gunalan a/l Ramachandran & 2 Others v. PP* [2004] 3 CLJ 551. The samples analysed by the chemist are therefore sufficient in law to support her conclusion. Even if *Loo Kia Meng v. PP* [2000] 3 CLJ 653 can, for a moment, be assumed to have been correctly decided the resultant reduction of the charge to one of possession is not in accordance with law. If the drugs analysed are insufficient to sustain a charge for trafficking it cannot, by the same process of reasoning, be sufficient to sustain a charge for possession as well. This is for the obvious reason that s. 37(j) of the Act is of general application and not confined to only charges of trafficking. Thus the reliance of the learned trial judge on *Loo Kia Meng v. PP* [2000] 3 CLJ 653 to reduce the charge is an error of law.

We interpolate to add that it would appear that the learned trial judge referred only to the weight of the drugs to determine whether there was a *prima facie* case for trafficking. He ought to have analysed the whole of the evidence in order to make such a finding. His failure to do so compelled us to undertake the exercise.

(c) The Reduction Of The Charge By The Learned Trial Judge

The facts of the case reveal that the dangerous drugs were recovered from a room which was occupied by the accused. At the time of the police raid he looked frightened. On the facts of this case there can be little dispute that the accused had custody of the receptacles containing the dangerous drugs.

What requires deliberation is whether he had knowledge of the contents in order to establish that he had possession of the dangerous drugs. As Thomson J (as he then was) said in *Chan Pean Leon v. PP* [1956] MLJ 237 at p. 239:

> Once possession is proved then before the accused person can be convicted it is necessary in addition to prove *mens rea.* And for this purpose as was pointed out by Gordon-Smith Ag CJ in the case of *Toh Ah Lam and Mak Thim v. Rex* [1949] MLJ 54, it is necessary to prove that the person in possession knows the nature of the thing possessed.
>
> If the thing, as in *Toh*'s case, is in a box which itself is in the possession of the accused it must be proved that he knew what was in the box. If, as in *Lee Boon Gan v. R* [1954] MLJ 103, it was a lottery document it must be proved that he knew it was a lottery document. Here again knowledge cannot be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite. There may be something in the accused's behaviour that shews knowledge, or the nature of the thing may be so obvious that it is possible to say 'he must have known what it was', or again in cases under the Dangerous Drugs Ordinance, there may be a statutory presumption which fills a gap in the evidence.

It is therefore clear that proof of knowledge is very often a matter of inference (see *PP v. Hoo Chee Keong* [1997] 2 CLJ Supp 357). It must be observed that the court is not concerned with the knowledge of a reasonable man but is concerned with a reasonable inference to be drawn from a concrete situation as disclosed in the evidence as it affects the particular person whose knowledge is in issue (see *RCA Corp v. Customs Cleared Sales Pty Ltd* [1978] 19 ALR 123). In this case apart from proof of custody of the dangerous drugs there is no evidence on record to infer knowledge of them by the accused. The fact that the accused looked frightened is neutral on the facts of this case. It therefore becomes necessary to invoke the statutory presumption in s. 37(d) of the Act to infer the required knowledge on the part of the accused in order to establish that he had possession of the dangerous drugs. It is therefore not possible to further presume that the accused was trafficking in the dangerous drugs as provided in the Act on the principle enunciated in *Muhamed bin Hassan v. PP* [1998] 2 CLJ 170. It follows that the reduction of the charge by the learned High Court Judge is still sustainable.

(d) The Adequacy Of The Sentence Imposed

It is well established that sentencing in drug offences must reflect the public interest to be served as it is an on-going national problem. The weight of the drugs involved is another factor to be considered. In this case the amount of dangerous drugs involved is very substantial. In such circumstances neither the guilty plea of the accused nor the fact that he is a first offender can be

considered too favourably in favour of the accused. Thus we were of the view that the sentence imposed by the learned trial judge was inadequate. Accordingly, we increased the term of imprisonment to 15 years. The imposition of the 10 strokes of the rottan was retained.

In the final analysis we dismissed the appeal against conviction and allowed the appeal against sentence in part.